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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CHARLES CHAPMAN, et al.,

Petitioners,

vs.

THE DOW CHEMICAL COMPANY, et al.,

Respondents.

PETITIONERS' SUPPLEMENTARY AND REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Subsequent to the veterans' filing the Petition for a Writ of Certiorari in the "Agent Orange" cases, this Court decided *City of Milwaukee, et al.* v. *States of Illinois and Michigan,* ____ U.S. ____, 49 USLW 4445 (decided April 28, 1981) and *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO, et al.,* ____ U.S. ____, 49 USLW 4383 (decided April 20, 1981) and the respondent chemical company war contractors cite these decisions in opposition to the Petition. Because respondents have apparently misread this Court's opinions, this supplemental and reply brief is respectfully submitted by the plaintiff veterans and their families. Supreme Court Rules 22 (4) and 22 (5).

ARGUMENT

In *City of Milwaukee (supra)*, this Court by its decision

(1) defined the circumstances under which resort may be had to federal common law in preference to the use of state law;

(2) decisively rejected the premise upon which the Second Circuit majority opinion and respondents' brief in opposition to the Petition for a writ of certiorari are posited; and

(3) clarified the responsibility of federal courts in cases of uniquely federal concern where Congress has been less than eloquent.

This Court effectively discarded, and indeed laid to rest, the specious notion that a federal court is powerless to apply federal common law without an act of Congress.

> "When Congress has not spoken to a particular issue, however, and when there exists a 'significant conflict between some federal policy or interest and the use of state law,' *Wallis*, 384 U.S. at 68 (footnote 7 omitted), the Court has found it necessary, in 'a few and restricted' instances, *Wheeldin* v. *Wheeler*, 373 U.S. 657, 651 (1963), to develop federal common law." *City of Milwaukee, et al.* (*supra*, Slip Opinion, p. 7).

Federal Common law "is resorted to in the absence of an applicable act of Congress (citation omitted) and because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone . . ." (citations omitted). *City of Milwaukee, et al. (supra*, Slip Opinion, p. 7).

Similarly, in *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO, et al., (supra)*, this Court "also has recognized a responsibility, in the absence of legislation, to

fashion federal common law in cases raising issues of uniquely federal concern, such as the definition of rights or duties of the United States . . ." (Footnote 32 omitted).

Respondent chemical companies argue that when the controversy is nominally between and among private parties, federal common law will be applied only upon an express demonstration that application of state law will actually frustrate a federal interest articulated in the Constitution or by Congress. However, both the majority and the dissent in the Second Circuit agreed that crucial federal interests were at stake and would be seriously affected by the outcome of the "Agent Orange" litigation. Even Judge Kearse, writing for the majority, agreed that the litigation will have a lasting effect on the relationship between the government and its war contractors. She likewise acknowledged the government's concern over the welfare of its veterans. Standing alone, these paramount federal interests are sufficient to displace state law.

That the national interest in the plaintiff veterans and their families is uniquely federal is at once apparent since it is based upon the *"War Powers Clause"* of the United States Constitution. Article I, Section 8. Implicit in the power of the federal government to conscript troops for military service is its duty to prevent any third party from interfering with that relationship. The only means by which federal interests will be defined and protected in this case is for the federal court to accept jurisdiction of the "Agent Orange" cases under 28 U.S.C. Section 1331 as a "federal question" and apply a uniform federal common law rule to all the veterans' claims which the District Court has now brought together as a class action under Rule 23. See, Brief *Amici Curiae* by the Ryan Family, Appendix A, pp. 40a-47a.

There is no act of Congress under which the issues arising from the unique tort claims of tens of thousands of Viet Nam combat veterans against a small group of chemical company war contractors can be determined uniformly.

The "Agent Orange" cases are a unique controversy clamoring for application of a uniform rule of federal common law if substantive justice is to be afforded all the parties. The annals of American law offer no historic precedent for a mass toxic tort committed by the federal government's war contractors against tens of thousands of United States soldiers serving their flag in a foreign country by order of several United States Presidents admittedly exercising the "war powers" under the United States Constitution (Article I, Section 8).

That uniquely federal interests are involved is beyond dispute. On the one hand, there is an overwhelming national interest in the welfare of our soldier veterans and on the other, a national interest in assuring an uninterrupted flow of chemical and biological warfare agents from the chemical company war contractors. Only uniform application of a federal common law rule to each of the thousands of "Agent Orange" cases can protect those federal interests and maintain national security. The unique national character of these cases must be perceived and respected.

The corporate defendants insist, and the Second Circuit majority has agreed, that the District Court should interpret and apply the conflicting product liability rules and disparate statutes of limitations of the fifty individual states to the tens of thousands of veterans' claims all arising from the same mass toxic tort that occurred in Southeast Asia during the Viet Nam war. Yet it is inevitable that federal interests will be frustrated by the application of disparate state laws. See, *The Federalist*, Appendix. Such a mandate requires consideration of the esoteric choice of law approaches in each state in an effort to reconcile the conflicts arising out of the parochial patchwork of their substantive product liability policies and makes it literally impossible for the Court to address the overriding federal interests in the "Agent Orange" litigation. See, Petition for Writ of Certiorari, p. 7; and Brief *Amici Curiae* by the Ryan Family, pp. 6-11.

There is no question but that in many jurisdictions if state law is applied, the claims of the veterans and their families will be time-barred. But, whatever the rule adopted by any individual state, the question of timeliness of this action, be it longer or shorter, goes to the heart of the federal government's ongoing relationship with these veterans and its present and future relationship with their successors in the armed forces of the United States. Uniformity in the context of the "Agent Orange" cases does not mean *sameness,* it means *oneness.* When our soldiers who were injured in Viet Nam as the result of a common design defect in a single class of chemical and biological warfare agents go to Court, their claims are uniquely federal in nature, involve national security, and compel application of a uniform rule of federal common law for determination.

By confusing a federal-state inquiry with a legislative-judicial one, the Second Circuit majority effectively frustrated the national interest in a case where federal interests are clear, identifiable, and acknowledged by all parties to be substantial. This point was well put in a perceptive critique recently published.

> " . . . Judge Kearse argues that since the balance sought involves a policy question, it should be struck by Congress rather than the courts. This analysis, however, ignores the traditional role of courts in formulating common law rules of liability. In the case of suits by injured servicemen against military equipment manufacturers, there is little dispute that tort remedies are appropriate. It also is evident that the application of state law in these cases may advance no state interest while thwarting federal interests. Since state law is inappropriate and Congress has not yet acted to formulate standards of liability, judicial development of federal common law standards is proper. As the Court said in *Standard Oil,* if federal common law is 'necessary or appropriate,' the courts may

> apply it 'even though Congress has not acted affirmatively about the specific question.' " (Footnotes omitted).

Stabile, Note, *Tort Remedies for Servicemen Injured by Military Equipment: A Case for Federal Common Law.* 55 N.Y.U. L. Rev. 601 (1980).

The soldier-veterans and their families have brought their "Agent Orange" claims to the federal courts. They intend to remain there. The federal interests will be defined for tens of thousands of veterans and important defense contractors. This is fact, not hypothesis. The Second Circuit majority has, by default, shifted the power to determine federal questions of overriding national concern to the states. In this context, the argument that federal interests will not be frustrated by the application of the laws of fifty states is utter nonsense. Federal interests will be frustrated because they will not be considered. National security interests will be compromised because application of disparate state laws will localize truly national issues.

It may be that the problems associated with the use of chemical and biological weapons during the Viet Nam war should be made the subject of comprehensive federal legislation, but until that happens, it is abundantly clear from *City of Milwaukee (supra)* and *Northwest Airlines, Inc. (supra)* that the "Agent Orange" cases belong in the federal court under "federal question" jurisdiction and they must all be decided according to a uniform rule of federal common law.

Under these circumstances, "federal question" jurisdiction is axiomatic. Resort to federal common law is the sole and necessary expedient for achieving equal protection of the law to all the parties, thereby protecting the national interest.

Respectfully submitted,

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APPENDIX

Selected Excerpts from

THE FEDERALIST

The Federalist No. 22 (Hamilton)

* * * Laws are a dead letter without courts to expound and define their true meaning and operation. * * *

If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the judges of the same court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.

This is the more necessary where the frame of the government is so compounded that the laws of the whole are in danger of being contravened by the laws of the parts. In this case, if the particular tribunals are invested with a right of ultimate jurisdiction, besides the contradictions to be expected from differences of opinion there will be much to fear from the bias of local views and prejudices, and from the interference of local regulations. As often as such an interference was to happen, there would be reason to apprehend that the provisions of the particular laws might be preferred to those of the general laws; for nothing is more natural to men in office than to look with peculiar deference towards that authority to which they owe their official existence. * * * The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will long consent to trust their honor, their happiness, their safety, on so precarious a foundation?

The Federalist No. 80 (Hamilton)

* * * It seems scarcely to admit the controversy, that the judiciary authority of the Union ought to extend to these several descriptions of cases:

> 1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation;
>
> 2d, to all those which concern the execution of the provisions expressly contained in the articles of Union;
>
> 3d, to all those in which the United States are a party;
>
> 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves;
>
> 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and
>
> lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentence of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. This is not less essential to the preservation of the public faith, than to the security of the public tranquility. So great a proportion of the cases in which foreigners are parties, involve national questions, that it is by far the most safe and most expedient to refer all those in which they are concerned to the national tribunals. * * *

It has been asked, what is meant by "cases arising under the Constitution," in contradistinction from those "arising under the laws of the United States"? The difference has been already explained. All the restrictions upon the authority of the State legislatures furnish examples of it. * * *

It has also been asked, what need of the word "equity"? What equitable causes can grow out of the Constitution and laws of the United States? There is hardly a subject of litigation between individuals, which may not involve those ingredients of fraud, accident, trust, or hardship, which would render the matter an object of equitable rather than of legal jurisdiction, as the distinction is known and established in several of the States. It is the peculiar province, for instance, of a court of equity to relieve against what are called hard bargains; these are contracts in which, though there may have been no direct fraud or deceit, sufficient to invalidate them in a court of law, yet there may have been some undue and unconscionable advantage taken of the necessities or misfortunes of one of the parties, which a court of equity would not tolerate. In such cases, where foreigners were concerned on either side, it would be impossible for the federal judicatories to do justice without an equitable as well as a legal jurisdiction. Agreements to convey lands claimed under the grants of different States, may afford another example of the necessity of an equitable jurisdiction in the federal courts. * * *

The Federalist No. 82 (Hamilton)

The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts.